

MINUTES
Approved by the Committee
Public Defense Reform Interim Committee
Thursday, September 25, 2014
8:00 AM to 3:00 PM
WW53, State Capitol
Boise, Idaho

Co-chair Representative Darrell Bolz called the meeting to order at 8:10 a.m. and requested a silent roll call. Members present were: **Co-chair Senator Todd Lakey**, Senators Dean Mortimer (via phone), Jim Guthrie, and Cherie Buckner-Webb; and Representatives Lynn Luker, Christy Perry, Janet Trujillo, and Caroline Meline. Senator Curt McKenzie was absent and excused. Legislative Services Office staff members present were Ryan Bush and Jared Hoskins.

Others in attendance included: Ian Thomson, Public Defense Commission; Daniel Chadwick and Dan Blocksom, Idaho Association of Counties; Lorna Jorgensen, Ada County Prosecutor's Office; Judge Molly Huskey, 3rd District Court; Holly Koole, IPAA; Marilyn Paul, Twin Falls County Public Defender's Office; William Wellman, Owyhee County Public Defender's Office; Richard Eppink and Kathy Griesmyer, ACLU of Idaho; Seth Grigg, Association of Idaho Cities; Matthew Gamette, ISP Forensic Service; Michael Henderson, State Supreme Court; Brad Andrews, Idaho State Bar; Richard Linville, Gem County Prosecutor's Office; and Carter Winters, Gem County Public Defender's Office.

Note: Copies of the presentations, reference materials and handouts are on file at the Legislative Services Office. PowerPoint presentations and handouts are posted on the Idaho Legislature website: <http://www.legislature.idaho.gov/sessioninfo/2014/interim/defense.htm>.

Co-chair Representative Bolz noted a correction to the committee meeting minutes for August 26, 2014, on page 5, paragraph 5, sentence 3, by inserting the word "now" following "the issues right." **Representative Luker moved to approve the committee minutes for August 26, 2014, as corrected. The motion was seconded and passed unanimously.**

Co-chair Representative Bolz remarked that he will forward the members information recently received from **David Carroll, 6th Amendment Center**, regarding lawsuits in Mississippi and New York.

Co-chair Representative Bolz introduced **Judge Molly Huskey, Chair of the Public Defense Commission**. **Judge Huskey** provided an update on the commission's activities. She identified the members of the commission: **Co-chair Representative Bolz**, Vice-chair; members Kimber Ricks, Madison County Commissioner; Idaho State Representative Jason Monks and Senator Chuck Winder; Sara Thomas, State Appellate Public Defender; and William Wellman, Owyhee County Public Defender. She stated the commission has met three times in person and once telephonically and they have selected **Ian Thomson** as their executive director. He will begin October 6, 2014.

Recognizing the commission is statutorily obligated to report to the Legislature in January on certain topics, **Judge Huskey** stated the commission has identified the data elements that the Public Defense Reform Committee and the Legislature would want collected. They are working with **Kevin Iverson, IT Director of the Supreme Court**, because the Odyssey Court Management Program will likely capture much of the necessary data. She stated the commission is aware that the public defenders need a mechanism for data collection, but do not wish to require more expenditure for software until they confirm the potential of the Odyssey program. She stated the commission identified two areas important to both the committee and the Legislature: standards and qualifications for public defenders; and the core contract elements, which are those specific contract provisions in every contract for contract public defender work. She noted the different types of contract work in the counties, with some contracting primarily with a public defender and most contracting for conflict work. She concluded there may need to be different provisions depending on the type of contract; or depending on the size of the county that is performing that kind of contract work.

At this point in her remarks, **Judge Huskey** asked the public defense reform committee, "if the commission can complete only one project, which would the committee choose, core contract provisions or standards and qualifications?" She stated she is not convinced the commission will be able to complete both by January, but will commit to completing one of them. **Representative Luker** asked if the commission has identified the most pressing issue and **Judge Huskey** answered that they prioritized both the standards and the contract provisions. Continuing, she stated they considered dividing the commission in two, with each subcommittee addressing one of the two pieces; however, she stated her preference for completing one project completely, rather than have two projects half-way or three-quarters of the way done. She added that addressing creation of rules or the recommendations for rules in the IDAPA steps is another project the commission is obligated by statute to complete by January. **Co-chair Senator Lakey** stated that the contract provisions project would be higher on his priority list. **Judge Huskey** responded by asking what the committee expected the commission to provide by the end of November. **Co-chair Senator Lakey** opined that guidance on standards would come from the commission, and that the committee would ensure that these standards would be a proper fit for Idaho. Following up, **Co-chair Representative Bolz** noted the difficulty of evaluating all of the standards various states have adopted, but he stated the commission will work to narrow it down a bit. Regarding standards and qualifications, **Judge Huskey** asked if it is the committee's wish for the commission to look at the skill set a particular individual would have to have to be a public defender or to look at the standards more broadly, in terms of caseload and workload. **Co-chair Senator Lakey** answered he is looking at both, establishing minimum standards, as well as caseload and workload.

Following up on **Co-chair Senator Lakey's** comment, **Representative Luker** agreed that the contract provisions should be on the front burner and perceived the qualification piece to be a longer term project. He stated the workload issue would probably go in a contract and sees those working together. **Co-chair Representative Bolz** invited **Judge Huskey** to comment on her observations so far and she stated the commission has applied for a technical grant from the Bureau of Justice Administration that would allow **Mr. Carroll** to provide technical assistance to the commission. It would not be difficult to come up with some minimum qualifications for individuals to be public defenders. It would perhaps be more difficult by the end of November for the commission to be able to say with any confidence that "these are the caseloads and workloads that we would like the committee to adopt." At present there is not good data on what caseloads are carried by public defenders, because there has not been a uniform definition of a criminal case in Idaho. She stated that one will be adopted with the roll out of Odyssey, but at present it is impossible to compare caseloads across counties without the uniform definition. She sees establishing minimum requirements for caseloads and workloads as a longer term project. She agreed with **Co-chair Senator Lakey's** statement that the solution must be the right fit for Idaho. She asked the committee to relieve the commission of any obligation to provide the definitive answer as to caseload and workload by the end of November.

Representative Luker explained that he brought forward caseload and workload because that seemed to be the focus area of the lawsuits. He thanked the commission for their work under such deadline pressure. **Co-chair Senator Lakey** agreed with **Judge Huskey** that they need the data to craft the solutions and observed it is easier to come up with the criteria for a public defender to serve and then identify moving forward the standards for that qualified public defender. **Judge Huskey** asked if **Mr. Thomson** might be allowed to make the commission's presentation at the next meeting of the committee. **Senator Guthrie** asked if she thought the commission is sensitive to the funding component. **Judge Huskey** responded the commission is extraordinarily sensitive to that, and explained that the makeup of the commission includes two members who work for small counties and all the members understand the financial constraints that both the state and the counties operate under. Additionally, she anticipates the commission will have ongoing conversations with **Mr. Chadwick** and the Idaho Association of Counties (IAC). **Judge Huskey** concluded, clarifying

that the commission will have some recommendations on each of these topics for the Legislature in January, it just won't be well vetted.

Co-chair Representative Bolz introduced **William Wellman, Owyhee County**

Public Defender. **Mr. Wellman's** PowerPoint presentation can be accessed at:

http://legislature.idaho.gov/sessioninfo/2014/interim/pdef0925_wellman.pdf. **Mr. Wellman** provided a brief summary of his background and then discussed his perspective on the operation of the Owyhee County Public Defender's Office. He stated there is no provision in his contract for conflicts; when he determines that a conflict exists, he informs the court and the court then makes a determination. Additionally, he stated that conflict compensation is paid through county funds: if it's a magistrate court appointment, it comes out of the district court magistrate budget; and if it is a district court conflict, it comes out of the district court budget. Other contract provisions for the Owyhee County Public Defender include:

- Two (2) year term;
- Compensation determined annually primarily on case load analysis;
- Conflicts: No provision in contract - No authority other than to identify conflict - Court makes conflict appointment - Conflict compensation from county funds;
- No provisions for support services, i.e. staff, investigations, evaluations, experts;
- When necessary, file a motion with the court for investigators experts and evaluations - adopted rule 12.3 allows a defense attorney to go to court and ask for an evaluation and have it paid for with county funds.

He stated his compensation reflects all his operating expenses. He identified his work facilities and their locations: law office 27 miles from the Owyhee County Courthouse (in Nampa); the jury deliberation room, attorney visitation, and Owyhee County Sheriff Office interview room (in Murphy); and the conference room adjacent to the courtroom (in Homedale). Drawing upon this information, he emphasized that his clients, who have financial limitations that result in transportation problems, consequently have fewer in-office meetings than other rural county public defenders.

Mr. Wellman reviewed the demographic data related to his law office and these details can be accessed at: http://legislature.idaho.gov/sessioninfo/2014/interim/pdef0925_wellman.pdf. He stated that being a good calendar manager is a key component for an out-of-town, part-time contract provider. He continued, explaining he has worked with the courts and developed an effective way to manage cases, which is essential for rural public defenders. Addressing the parity issue, **Mr. Wellman** stated he sees parity as some level of equality in the processing of cases between the prosecution and the public defense. He observed there will never be parity in the talent pool and provided a detailed comparison of county personnel and budgets for the two offices. He went on to identify unique issues in Owyhee County, including: location; travel; client access; and clerk's offices.

Representative Luker asked if the county prosecution's total budget of \$222,778 includes the civil side and **Mr. Wellman** responded that \$222,778 is the entirety of the prosecutor's office budget. Following up, **Representative Luker** asked, in terms of parity and the difference in the talent pool, what the parity issues are in a rural county. **Mr. Wellman** explained when most cases come to his office the law enforcement work is already done like with most small counties. There isn't necessarily a very sophisticated investigative staff on the law enforcement side, while larger counties have dedicated detective services. He continued, noting that in several complicated and serious cases, he received the court's authority and budget to hire an investigator. Due to his years of experience in the job, he stated he can assess each case and determine what he needs, but he added the next guy coming along might not do it the same way he does.

Senator Guthrie asked if he thought the system was working well enough and asked if he could suggest two or three things to improve the system. **Mr. Wellman** responded that one of the things he has not done is maintain time records. Though important, he explained that it is problematic, as

it adds another administrative layer in the process of serving clients. He stated it is necessary to have contract standards, but he opined that as the standards of practice are more clearly defined, more time will be necessary to achieve the standards, and in turn the cost to the county will increase. Recognizing **Mr. Wellman's** part-time public defender status, **Senator Guthrie** asked if he could provide a more accurate picture of the disparity in the funding of the two offices, and **Mr. Wellman** responded that he doesn't want to quote numbers on how many felony cases he handles, as compared to private counsel, but stated he understands that the Owyhee County prosecutor is the sixth highest paid prosecutor in the state and he is the twenty-ninth highest paid contractor of the public defender offices in the state.

Recognizing how critical case management is in a rural practice, **Co-chair Senator Lakey** asked if there is an assisting role for the Legislature. **Mr. Wellman** responded he didn't think this could be dealt with at a legislative level. He stated it is a court administrative function; in small counties every county has a resident magistrate and it is incumbent on the magistrate to be a time manager. He gave credit to **Justice Eismann** and **Judge Ryan** for their sensitivities to the needs of their county. He stated that the bulk of what they handle is on the criminal calendar, an infractions calendar. Following up on the subject of arraignments, **Co-chair Senator Lakey** asked about the timing of court appointment and his appearance and **Mr. Wellman** explained the timing: the arraignments are generally on Monday mornings; if it is an in-custody, it is the following afternoon following the arrest; and the clerk is quick in sending him the notice of appointment.

Again looking at the parity data, **Representative Perry** asked if he sees barriers to public defenders access to and help from the state lab. **Mr. Wellman** responded that he sees the problem with use of the state lab to be the adversarial process. Continuing, he observed the nature of the system has a built-in bias against using the same resource that every county prosecutor uses constantly. He emphasized he is not criticizing the competence of the state lab professionals, and he restated the public defender offices need to go outside to have verification for no other reason than just it is an adversarial process. **Representative Luker** asked if he saw any feasibility or benefit to having a contract with a dedicated public defender lab and **Mr. Wellman** answered that it would be a great benefit to defense services to have a dedicated contract provider, preferably in-state. Following up, **Representative Luker** asked if there are one or two labs he and his peers in other counties use in common. **Mr. Wellman** answered that it depends on what the need is and he added the most popular area is up and down the west coast.

Senator Guthrie asked if testing can be done at the state lab, if procedures are changed to enforce the necessary independence and **Mr. Wellman** answered that he did not believe that it was possible to overcome the angst and mistrust in the present building. He stated it would be better and cleaner if it was an independent process. **Representative Perry** asked if the present system provides two separate lab results from the same piece of evidence in most criminal cases. **Mr. Wellman** stated that in the vast number of investigations, there is not a second set of checks, unless there is something that doesn't seem to fit right. Continuing, he explained that a lawyer is required to understand a fair amount about the science involved and, if the science does not appear to support the conclusion coming from the evidence analysis, then a second opinion is sought outside through further testing or bringing in an expert to look at a report and evaluate if the conclusion matches what the question was. **Representative Perry** asked if in most instances the results from the state lab are usually sufficient and **Mr. Wellman** stated that the vast majority of the cases that have technical, expert analysis done are not reviewed by the defense with an expert and they won't send them out for a second test. **Representative Trujillo** asked if he would investigate further, if funding and access were available and **Mr. Wellman** responded that in a perfect world, and if there was value in doing so, he would. He added that not every case needs a second review. **Mr. Wellman** shared two suggestions for improving the public defense system: (1) Create districtwide public defense offices with small county satellites to provide efficiencies with training and education, staff

support, investigators and experts; and (2) Reclassify certain minor misdemeanors to infractions in order to keep a lid on costs.

Co-chair Representative Bolz commented that the reclassification issue was taken up by the Criminal Justice Commission, on which **Mr. Chadwick** has worked on quite a bit, and he added the committee will consider it as well. He thanked **Mr. Wellman** for his time serving on the Public Defense Commission, for his interest, and his expertise.

Co-chair Representative Bolz introduced **Richard Linville, Gem County Prosecutor**. **Mr. Linville** in turn introduced **Carter Winters, Gem County Public Defender's Office**. **Mr. Linville** stated the prosecutor's job is to protect individual liberties. Consequently, it is his professional responsibility, if the county gets sued for not providing an adequate defense, to address and solve that problem. He stated his opposition to **Mr. Wellman's** idea of a district-level public defender. He illustrated the work/time distribution in his office. One-third or one-half of the time is devoted to representing the other elected officials and personnel in the county. One of the three office attorneys is dedicated to civil work and he splits his time between civil work and criminal work. He stated his office has quite a bit of criminal work with private defense counsel and that this is particularly true with more serious crimes. He continued, explaining that while the public defender has all the indigent cases, his office deals with private defense counsel, which takes a significant amount of time. **Mr. Linville** emphasized the importance of maintaining a good working relationship with the public defender's office. He observed that the reason justice moves smoothly in his county is due in part to the additional jobs unique to the prosecutor's office. He stated that by rule, prosecutors provide the evidence to the public defender that he uses to put his case together. **Mr. Linville** stated he is perplexed by the suggestion of two separate labs, opining that if the lab work is not good lab work, neither the prosecutor nor the public defender wants to use it. Continuing, he stated that if it is questionable, he would want to send it out to somebody else. He concluded that there is no need for two different labs, because they are both doing the same work.

Mr. Linville emphasized that his presentation theme is "to keep public defenders county based - to keep it local." He stated that local accountability is an important and efficient part of the operation of small county court systems. He noted how the citizens of his county lost availability to health and welfare services with the regionalization of that office. Continuing, he opined that the regionalization approach applied to defense services would particularly hurt the small counties. He stated that clients who depend on the public defender cannot drive to Canyon County, to Caldwell or to Boise for the services. He observed they can't drive at all, so they need to have a local public defender office. He suggested that Gem County could probably support an in-house public defender, though the county contracts with **Mr. Winters'** firm now. He opined that most of the counties in Idaho could support an in-house public defender, if they combined one or two counties like Adams County with Washington County and Owyhee County with Canyon County. Continuing, **Mr. Linville** stated that the Gem County Commissioners are afraid of legislation. He recounted that one county commissioner recently told him that his concern is not the imposition of a requirement for additional standards at the county-level, but that the requirement will be imposed without providing a funding source. Specifically, **Mr. Linville** clarified that the commissioners are not afraid of administering public defender contracts, but they are afraid of having additional financial burdens.

Mr. Linville discussed how local experience is critical for public defenders. He observed that in a small county like Gem County, the criminal prosecution, the court system, and the public defender and defendant community is pretty small. They all know each other. Both he and **Mr. Winters** know almost all the criminals in Gem County, as well as their families. He stated **Mr. Winters** is required to have a local office by contract - his clients can walk to his office and he has regular access to clients in jail. He discussed the benefit of local control over the public defender contract in those instances when problems arise. He observed that one measure for identifying problems in the criminal system is the number of post-conviction cases. He noted there has been only one post-conviction case in Gem County during his 25-year career and there have been very few statewide. He discussed the

value of allowing local public defenders the discretion to decide how much time they spend on a case. Continuing, he observed that most small county cases are routine, but that occasionally they have a difficult case where more expenses are involved. **Mr. Winters** suggested the committee might consider providing additional resources in these instances. He recalled that in the past the county turned to the Attorney General's office, but they no longer have the resources to assist. **Mr. Linville** discussed the benefits of providing additional qualifications and training opportunities for public defenders. He stated there are some limited areas where training can be accomplished with prosecutors, like the immigration area. He suggested it might be a good idea to have additional certification for criminal work, but he asked that the burden of financing this training not be put on the counties, because they are unable to accommodate that financing.

In closing, **Mr. Linville** restated that county prosecution and public defense are local functions, and even if they are partially or wholly funded at the state level, they should be administered locally. He opined that removing public defenders to regional offices would be attempting to solve a problem they do not have. He continued, stating that standards for training and performance can be adopted and the funding mechanisms can be changed without depriving small counties of the dedicated public defenders they have.

Senator Guthrie noted how **Mr. Linville** expressed that he had a professional responsibility to address and solve public defense problems, and asked how widespread that mindset is among prosecutors statewide. **Mr. Linville** responded that he couldn't see why a prosecutor wouldn't think that way. They all have the obligation to protect their county, particularly in the litigation setting. He stated that one of their most important jobs as prosecutors is not to go into court defending their county in litigation that is filed, but to prevent the litigation. If he sees a public defender contract that he thinks is vulnerable to litigation, he will want to change it. Following up, **Senator Guthrie** asked if the supposed disparity between the prosecutor and public defender offices exists and to what extent. **Mr. Linville** stated there is a difference in funding, because they are different jobs. Like in Owyhee County, the prosecutor's office is funded twice as much and performs twice as many duties as the public defender does. Because a local prosecutor lives in the community and has a lot of additional functions in the community, unlike a public defender who is not required to reside in the community. He stated that he didn't mean that the public defender doesn't need more funding, but just, if you are going to require additional training and certification, then there should be additional funding. He added that he wondered about why there is such a focus on balancing the budgets between the two offices, when both are essentially trying to accomplish the same goal, which is to protect people's rights and liberties.

Senator Bucker-Webb asked if the intimacy that exists in a small county ever negatively impacts his ability to do his job as a prosecutor. **Mr. Linville** stated that as a prosecutor, it helps him to know the community he's working in. He explained that he doesn't have to wait until a child is hurt to know that children may be threatened, because he knows the environment that many of the children are in. Responding to the question from a public defender's standpoint, **Mr. Winters** observed that the positives outweigh the negatives. Though their work often involves legal intervention, he observed that in a small community they are allowed to exercise human intervention. For example, he stated that he gives every client his cell phone number, making it easier to provide whatever intervention is necessary and so, perhaps, stop something before law enforcement is involved. Continuing, he noted that the good thing about local control is the sheriff's office has his cell phone number as well, and they call him, sometimes alerting him to a situation where he can intervene in the best interest of his client and law enforcement. He voiced concern this might be lost if they switch to a satellite office. **Co-chair Senator Lakey** asked **Mr. Winters** if he enjoyed a good relationship with his county commissioners, particularly related to the financing issue. **Mr. Winters** stated that his boss **Mark Mimurra** works directly with the commissioners and he'd rather **Mr. Mimurra** answer that question. He added that he has not heard any complaints and that he believes they have a good relationship with the commissioners. Following up, **Co-chair Senator Lakey** asked **Mr. Linville** to

answer the question from his vantage point. **Mr. Linville** answered that, if the relationship is good and if there were a problem, he'd get in the middle of it. He stated that, if the public defender had a problem with the funding of their contract, they probably would come to him, because it is his responsibility to mediate that problem with the commissioners. **Co-chair Senator Lakey** asked if an accurate summary of his description of the commissioners perspective is that the commissioners prefer to maintain local control and are concerned about unfunded mandates from the state and **Mr. Linville** answered they are concerned about unfunded mandates. He stated that Commissioner **Lance Smith** is concerned that there will be additional training and requirements that will need to be funded and the commissioners will be told to come up with the money. **Mr. Linville** added that in order to avoid that exposure, he believes the commissioners see one alternative to be the state taking over the public defender contracts. He also mentioned the proposal from the IAC that caps the counties expenses.

Representative Luker asked if **Mr. Linville** could identify the areas where constitutional deficiencies need to be addressed in Gem County, areas such as: vertical representation, caseload management; and adequate training (in terms of resources). **Mr. Linville** responded that he doesn't have exposure to the system's constitutional deficiencies referenced, but from his own experience he takes pride in having worked with good public defenders who provide good service to every client. He observed that smaller counties like Clark and Custer counties have different challenges and suggested they will have to combine with other counties to provide the required services. He stated that Gem County is able to provide those services on a county basis. He continued, noting it would be helpful to receive support from the state, so they could have the ability to address the occasional murder or serious case. Also, he suggested additional training and certification of public defenders would be helpful, but he doesn't see a deficiency in that area. He emphasized that one of the ways they address requirements to provide services is through cooperation between counties. **Senator Guthrie** asked if funding from the state might compromise the integrity of the process and the local control he valued. **Mr. Linville** observed that funding tends to bring control to the source of funding and he stated there is a potential for loss of local control.

Representative Perry asked if, in the past 15 years, he has seen growth in the budgets for both offices or if they have stagnated. **Mr. Linville** stated that both office budgets have kept pace. He added that the population in Gem County is not increasing radically. **Representative Trujillo** asked if he believes going to a regional system will take away from local control and, if it will, to describe the anticipated changes. **Mr. Linville** responded that he sees it taking away from local control, relating that in his district, if there is a regional office in Canyon County, then Canyon County will benefit and Owyhee, Adams, Washington, Payette and Gem Counties will suffer. He also referenced his earlier-mentioned example of the negative results experienced from regionalizing the county health and welfare services. He added that he believes the small counties will suffer under a regional system.

Co-chair Representative Bolz introduced **Bradly Andrews, Bar Counsel, Idaho State Bar**. **Mr. Andrews** provided a brief summary of his background and explained that his work often involves answering calls from lawyers, including a number of calls from public defenders and other criminal defenders. He stated that he is not a public defender. He provided a list of questions he planned to answer and discuss in depth, including: 1) Is there a conflict of interest? 2) If so, it is imputed to the public defender's office. 3) Whether circumstances exist, on a case-by-case basis, to justify asking the district court to determine the conflict is not imputed. His PowerPoint presentation entitled "Overview of Conflicts and Conflict Counsel," can be accessed at: http://www.legislature.idaho.gov/sessioninfo/2014/interim/pdef0925_andrews.pdf.

Mr. Andrews stated the Idaho Rule of Professional Conduct 1.7, "Conflict of Interest: Current Clients," is the primary rule of professional conduct that applies to public defender conflicts. Paragraph (a) of the rule states there are two types of conflicts that lawyers have to evaluate in determining conflicts with current clients:

1. The representation of one client will be directly adverse to another client; or

2. There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships.

Mr. Andrews stated that Type 1. is the most common case that applies in a public defense situation. Continuing, he identified Type 2. to be more subtle and the one he gets most of his calls about. He emphasized that it is the lawyer's decision, not bar counsel's, to determine if there is conflict, because they know the facts and need to deal with the situation as they see it. He observed that public defenders are called upon to make these decisions. Continuing, he stated that notwithstanding the existence of a concurrent conflict of interest under IRPC 1.7, paragraph (a), a lawyer may represent a client if:

1. The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. The representation is not prohibited by law;
3. The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4. Each affected client gives informed consent, confirmed in writing.

Mr. Andrews continued with his review of aspects of conflict in more depth, including the following points:

- A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.
- Most conflicts are imputed to other lawyers associated in a firm, unless it is a personal interest conflict.
- "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization; and
- The conclusions of *State v. Cook* and *State v. Severson*.

Representative Luker asked if, from the public defender standpoint, there are sufficient conflict complaints to cause him to feel like Idaho has a problem. **Mr. Andrews** answered no, the calls he gets are of the type **Mr. Linville** alluded to. For example, he will talk to someone, they'll have a conversation, and at that point the lawyer will conclude he has an impermissible conflict and must therefore find somebody else. **Mr. Andrews** stated that oftentimes in this situation there is the ability to call other public defenders within the community and essentially trade some of the conflict cases. He continued, stating that the court may be concerned about certain felonies, in the instance when there may be only a couple of people that are qualified, and if they are working together as the two public defenders in that county, it may be difficult to find anyone else within the county that might be qualified to take on that felony matter. **Mr. Andrews** observed there isn't much of an issue with misdemeanor cases.

Co-chair Representative Bolz welcomed back **Michael Henderson, State Supreme Court**. He presented information requested by the members at the August 26 committee meeting. **Mr. Henderson's** handout that provides the specific information requests, along with the court's detailed responses, can be accessed at: http://legislature.idaho.gov/sessioninfo/2014/interim/pdef0925_henderson.pdf. Areas covered by **Mr. Henderson's** presentation included:

- Drug Court, Mental Health Court and Family Court Services Fund;
- General fund receipts from fines and fees;
- Collection rates;
- Effect of the priority of payments; and

- Public School Income Fund.

After reviewing the court's responses, **Mr. Henderson** stated that he and **Tanya Jones**, the Supreme Court's Research Analyst, met with **Ryan Bush** and **Jared Hoskins** last week and talked about some additional requests for information, discussing what the court can supply and what information may be more of a challenge to obtain. He stated that they will continue to work with **Mr. Bush** and **Mr. Hoskins** to try and provide that information, as well as some of the responses to additional requests made by members of the committee, at the October meeting. Speaking to the topic of vertical representation, **Mr. Henderson** noted that one of the witnesses at the August meeting suggested there might be some helpfulness in the judge handling, for instance, a felony case throughout. He noted several obstacles in its application, with regard to the areas of assignment of district judges and magistrate judges, and giving them authority throughout. Additionally, he anticipated the financial impact to be one the Legislature is not ready to take on.

Mr. Henderson stated that the court currently has the Advancing Justice Initiative, which is being spearheaded by **Senior Judge Barry Wood**. The project's aim is to find the best ways of processing cases effectively, both on the civil side and the criminal side. He noted that the large amount of work done related to time standards, which is now Idaho Court Administrative Rule 57. He stated the initiative is continuing to examine the whole landscape. He detailed aspects on the criminal side, including: scheduling of trials; scheduling of pretrials; how to handle continuances; and alternate dispute modes. He referenced Rule 18.1 of the Criminal Rules that deals with the mediation of criminal cases and Rule 12.1 of the Juvenile Rules, which deals with mediation of juvenile cases, to show that it is all being explored.

Mr. Henderson stated that he was not aware of anything in the court's scheduling that would specifically impede vertical representation of defendants in criminal cases. He continued, stating that their trial court administrators and administrative district judges are certainly willing to work on that and he offered to take up any of the committee's suggestions. He also commented on the earlier-voiced concern regarding problems the defense has working with the state lab. He wondered whether it is possible to have a separate lab. He stated the problem with a separate lab is that you would get far less work for a lab coming from the defense side, and if the lab is smaller, it might not have the degree of specialization the defense requires for testing. He stated that the newly adopted Criminal Rule 12.2 is as an effort by the court to address applications by defendants for additional funds for investigative expert and other services that they may need. Continuing, he stated the procedure for submitting motion is now in place with Rule 12.2, which can be accessed at: http://legislature.idaho.gov/sessioninfo/2014/interim/pdef0925_henderson2.pdf. **Mr. Henderson** explained that they set up a procedure for applications and for a judge to act as gatekeeper for those funds. The expense associated with this will come out of the district court fund or other county funds. He added that he thought the rule would be helpful for the committee members to review with regard to how the court tries to approach this concern.

Representative Luker asked to what extent counties budget for any of these excess orders of the court. **Mr. Henderson** stated that it varies considerably by county and **Mr. Chadwick**, added that counties do not necessarily budget specifically for Rule 12 motions, but what they will do however, is within their Justice Fund or their current expense fund, have a reserve appropriated that the commissioners can draw on and allocate for these kinds of motions depending on the need in a particular case. **Mr. Chadwick** added that it also can come out of the county's public defense budget. Following up, **Representative Luker** asked if there have been instances where a court's order has exceeded the reserves or sent the commissioners scrambling to figure out how to pay for it. **Mr. Chadwick** answered that he doesn't have any information to that effect. **Senator Mortimer** asked if the percentages provided in the felony and misdemeanor cases include the percent waived. **Mr. Henderson** stated that he believes these figures are based on excluding the amounts that have been waived. He explained that they first take the amount that would be included in the court's judgment and then later the percent waived is calculated on the basis of how much of the fee is collected.

Referencing the collection rates of 96%, 83% and 54%, **Senator Guthrie** asked if the fees have been raised in an attempt to force these numbers down. He also asked, if he were to aggregate the three collection rates, how much is left on the table. **Mr. Henderson** answered that you would think that as fees increase you would get a lower collection rate, but from the numbers that he is looking at and from what he has seen in the past, it appears that the collection rates have gone up somewhat. He suggested that this may be because of the tax intercept, which has brought in a few million dollars and has been a tremendous help in that regard. He opined that going forward increasing fees is a matter of concern, particularly when you get to probation supervision fees, and Drug Court and Mental Health Court fees; you run into a problem after a while of how much you are going to get out of certain defendants and whether it will be an impediment to their satisfying all the terms and conditions that they face. With regard to the money that comes into the Drug Court, Mental Health Court, and Family Court Services Fund, **Mr. Henderson** stated the collections to that fund are all allocated and expended in keeping with the legislative appropriations, but basically they don't really have a whole lot of carryover from one fiscal year to another.

Looking at the 96%, 83%, and 54%, **Senator Guthrie** commented that you would assume a lot more money is left on the table, because of the lack of collection of the felony area. He asked, if you collect everything, wouldn't the total be \$10 million or \$15 million. **Mr. Henderson** responded he wasn't sure he could provide a number for that. He noted there are a lot more infractions than misdemeanors, and a lot more misdemeanors than felonies. So the actual amount that is left on the table may be from the misdemeanor cases, because there are so many of them. If necessary, he offered to provide better numbers on that. **Co-chair Senator Lakey** asked **Mr. Henderson** if his data includes amounts that are being waived or is it tracked. **Mr. Henderson** answered they are attempting to track this and they have some concerns about it. They added a provision to one of their criminal rules making clear that a fee could be waived only if there was a specific statutory provision that allowed for waiver of the fee and that there had to be a finding with regard to that waiver. Continuing, he stated they have tried to make that process for the waiver of fees more exact. He suggested it may be easier to extract the numbers on waiver of fees when they move to Odyssey than under our present system.

Co-chair Representative Bolz introduced **Jared Hoskins, LSO Budget and Policy Analyst**. **Mr. Hoskins'** PowerPoint presentation can be accessed at: http://legislature.idaho.gov/sessioninfo/2014/interim/pdef0925_hoskins.pdf. He stated that Legislative Services Office was asked to conduct a very preliminary fiscal analysis of the cost of potential public defense reform in Idaho. Though there still are some decisions left to be made by the newly appointed Public Defense Commission, as well as this committee, he stated they still can identify the outer bounds of what those potential costs might be. He continued, indicating they can run some different scenarios by taking some of the reform measures that have been discussed by this committee, and by those specifically identified in the concurrent resolution that authorized the committee, and they can apply them to certain assumptions that can identify those fiscal impacts. And, they can apply each of those measures either collectively or individually. Specifically, measures such as: caseload standards, training, and resource parity have been discussed. For example:

- How much extra would it cost public defenders, if they had to reduce their caseloads in conformance with certain standards;
- How much would it cost to provide the training necessary for the public defender, so they can provide constitutionally adequate representation;
- How much would it cost to some level of resource parity for public defenders, as compared to prosecuting attorneys.

He stated that in order to answer these questions they need data. Much of the discussion on public defense so far has been largely anecdotal. He believes this is due to several factors:

- Section 19-864, Idaho Code - Until 2013, when the Legislature amended this statute, only a handful of Idaho's 44 county public defenders were required to submit any data. The statute now requires all defense attorneys, which includes county public defenders, contract public defenders, and even appointed counsel, to submit data reports annually to their respective boards of county commissioners, as well as their respective administrative district judges. At present, they are only required to report the persons represented, the crimes involved, and the expenditures made in doing so.
- Public Defense Commission - Established by the Legislature in 2014, the commission has been delegated rule making authority to promulgate certain administrative rules and certain data reporting requirements. **Mr. Hoskins** observed that it will be some time before public defenders are actually reporting pursuant to those requirements.
- Odyssey System - Although the courts do certainly have the ability to readily query certain data (for example, the number of felony cases by county), they do not have the ability to query the number of cases in which a public defender is appointed, so it is his understanding that the Odyssey system is going to remedy this type of limitation.

Mr. Hoskins discussed the potential methods that they might employ to gather the data, given the limitations. He stated they have had some discussions with the courts about potentially taking a random sample of cases statewide and projecting the statistical analysis, the number of cases in which the public defenders are appointed, so they can get those numbers. The IAC reported data from the counties, they took a survey on the actual expenditures of prior fiscal years, as well as year-to-date actuals for those expenditures for 2014. The IAC is going to be conducting a follow-up survey at the conclusion of the current fiscal year and he stated that the IAC might allow them to piggyback on that report to get some of this other data they are looking at. **Mr. Hoskins** briefly reviewed the tabulation method they will use to track the data gathered and he stated the data gathered by source will include:

- The Courts: Case Sampling;
- IAC Survey; and
- Other Surveys (County/City PAs; County/Contract PDs).

Senator Guthrie asked **Mr. Hoskins** if he sees a tipping point with data collection and reporting, where at some point it becomes unnecessarily cumbersome and takes up valuable time you could be doing something else with. **Mr. Hoskins** responded that much of the discussion has been based on anecdotal information, so he thinks some of the data collection might be more burdensome up front. But, as the Public Defense Commission begins promulgating those rules, he stated he thinks everyone will get into a habit of reporting this data. Additionally, he suggested that the Odyssey system should make that easier and some of that data reporting burden should be reduced moving forward. He emphasized the value of having a central repository for the data. Addressing **Senator Guthrie's** concern, **Co-chair Representative Bolz** stated that the Public Defense Commission has been looking at this issue of how to collect this data and how much imposition it might be on the people providing the data. He stated it seemed like a lot of the data will be coming from the Odyssey system; data is already being inputted by the court clerks, but he stated the subject of the data was unclear, whether it was the public defender contract person or conflict attorney involved, and that providing an attorney classification check box for the clerks would be all that is necessary to make the data usable. He stated that the commission will be looking at this from the standpoint of trying to make it the least cumbersome process possible for the individuals involved. **Representative Luker** recounted that there is the reporting required from section 19-864, Idaho Code, coming in. Also, the commission is going to be collecting its data and Odyssey will be collecting data. Given that, he asked **Mr. Hoskins** if he has sent out additional, specific requests from LSO. **Mr. Hoskins** answered that he has reached out to the city attorneys, to **Seth Grigg, Executive Director, Association of Idaho Cities (AIC)**, and also to the Idaho Prosecuting Attorneys Association and the Idaho Association of Criminal Defense Lawyers. He stated the hope is to send

out a survey to get some of this data right away, and, if they can get the cooperation of those organizations and get that data collected, he stated they will have the data available for committee review at the next meeting. He added that the IAC will be submitting a follow-up survey to the counties and noted that data will be folded into his report pretty quickly.

Co-chair Representative Bolz introduced **Matthew Gamette, Laboratory System Director, ISP Forensic Services**. His PowerPoint presentation entitled "Role

of Forensic Services in Serving Prosecution and Defense" can be accessed at:

http://legislature.idaho.gov/sessioninfo/2014/interim/pdef0925_gamette.pdf. **Mr. Gamette**

recognized his boss, **Major Clark Rollins, Director, ISPS**, who is in attendance. He stated that last year, with 26 employees, ISPS worked over 10,000 requests for forensic services. And, he added there are a lot of other things his lab does that are not casework related. Topics covered in his presentation include: organization and services of ISFA; accreditation and certification; transparency; ethics, neutrality, and relationships; neutrality in a prosecutorial-based evidence system; private versus public defenders; the reshaping landscape of forensics in the country; and bias.

Introduction - **Mr. Gamette** stated they have three labs, located in Coeur d'Alene (a new facility), Meridian (the facility is in conjunction with the ISP campus), and Pocatello (where they hope to be rebuilding soon). He reviewed a list of the services they provide, and commented this list is available at their website: <http://isp.idaho.gov/forensics/index.html>. **Mr. Gamette** noted that it is mainly efficiency that they are looking at. In many cases they have a minimum number of samples to run an instrument, so they look to batch those samples for cost efficiencies. He stated they are also looking for the turn around times that are expected by the courts and by their customers; they have localized some of these services to different areas. In the case of DNA, biology, latent prints, those are only offered in Meridian, whereas firearms is only offered in Coeur d'Alene. Continuing, he explained that last year there were 22 firearms, so not enough to keep one examiner busy, but they do have the firearms examiner there. Continuing, he noted that they are trying to be three employees deep at every discipline, so they will still be able to offer those services when they happen to lose someone to another state or lab. He explained how some ISPS staff members work in multiple disciplines. He observed that the staffing equivalents are pretty low - Idaho is a small state, so a small state lab system - and that comes with some inherent challenges. He stated one challenge is having people work in multiple disciplines, which means they have to stay proficient in multiple disciplines.

Accreditation - **Mr. Gamette** stated how really important accreditation is to them. He commented that one of the things that separates their lab from a lot of labs in the country is that their lab was one of the first labs in the country to seek accreditation. He stated he believes Idaho's lab is forward thinking, commenting that even now they are trying to stay ahead of the curve for the national trends; as an example, he explained how their lab was one of the first state labs to incorporate the new quality management system (ISO) into Idaho's process. He emphasized that the lab's mantra is "We Lead." **Mr. Gamette** emphasized that Idaho also leads in certification, noting that Idaho is the only lab system in the country that requires analysts to be certified by a recognized certification program. He clarified that his presentation is strictly focussed on the three labs of the Idaho State Police Forensics Services.

Productivity - **Mr. Gamette** referred to the 2014 productivity data PowerPoint slide, which includes the total for assignments worked and a breakdown of DNA database samples processed. He credited the Legislature for getting them the money for the personnel and for the legislation that allowed them to process more convicted offender samples into that database. He observed that any time they can add more samples in the database, they have more potential to solve and unsolve crime, not only in Idaho, but also in other states that are contributing to this database. He clarified that it is a national database and Idaho's data goes into it. Looking at the breakdown, he illustrated how busy his people are in some disciplines, like blood toxicology and controlled substance analysis. He also noted the services the lab provides and the responsibilities they complete that are not reported. **Mr. Gamette** highlighted the turnaround times for their services by presenting

each discipline, with its strategic goal and current average turnaround time. He observed they are holding the line pretty well in most of the disciplines and they hope to continue to do so even with short staffing this current year.

Transparency - **Mr. Gamette** stated that he has been working on this area since he arrived six years ago, starting with a thorough overhaul of the ISP and the ISPFS website. The focus was to make it more available to their stakeholders and keyed on their analytical methods. He noted the other new information on the website, including: their accreditation information, by lab; all of their staff curriculum vitae (available in a few weeks); instrument certifications; and breath testing operator and specialist training documentation. He also emphasized their efforts to get information directly to the prosecutors as soon as it is finished in the lab. They can log in and have access to not only the report, but they can get all of the scientists analytical notes. It is in PDF format and they can send it on to the defense immediately. He noted the prosecutors and the courts can get real time information about where the case is and how long it is going to take to get the analysis finished and ready for them to go forward with in court. He also explained that they have gone paperless. The system went live in October, 2013, and he reemphasized that no lab in the country is making every analysts' notes available immediately. He reviewed IDAPA 11.03.01, the blood, breath, and urine alcohol administrative rule, detailing the recent court challenges, specifically to the scientific review process, where the focal point was lack of adequate transparency. As of September, 2014, **Mr. Gamette** continued, the lab changed IDAPA, it now has more instructive directions to the officer on how to perform the tests on those sort of things.

Challenges the Lab Faces - Challenging aspects of court testimony that **Mr. Gamette** discussed include: competing subpoenas from different counties; distance; travel and waiting time. He also provided an example of the time and money expended in 2010 Ada County (CDA lab scientists only) for one expert. He stated that they worked with the courts and attorneys to improve this and passed a criminal rule last year that allows for any forensics expert to be able to testify via real time streaming video. He noted this should be a very good thing for defense, specifically because defense experts are hard to find, at least ones that follow the accreditation requirements and the other regulations. He stated that they would like to see this used more.

Ethics and Neutrality - **Mr. Gamette** stated that as an accredited lab, they are required to have a code of ethics and to review the code with the scientists every year. He listed several code requirements of the lab, including: to be independent, impartial, detached, and objective in order to fairly represent the science; provide conclusions based on the evidence; they only render conclusions that are within their area of expertise; honestly communicate with all parties about all information relating to their analyses; and present accurate and complete data in reports, testimony, publications and oral presentations. He summarized the lab's transparent relationships with ISP, investigators, prosecutors, defense, courts and suspects/victims. Speaking directly about the relationship with ISP, he stated ISP tries very hard to not have the law enforcement side of the house influence the lab side of the house, by taking the necessary precautions with policy and procedures.

Burden of Proof and Defense Experts - **Mr. Gamette** stated the criminal justice system works under a burden of proof for the prosecutors, so generally they get lab submissions from the prosecution and from the law enforcement agency at the direction of the prosecutor. The lab accepts evidence only on criminal cases from: law enforcement agencies, cases from prosecutors and from public defenders. Also, they do things by court order, they do things for education, and they also retest. **Mr. Gamette** spoke briefly about defense experts, explaining that whenever they have a defense expert come into the lab they pretty much have to shut down due to security, accreditation, and contamination issues, because they have to decontaminate everything. When the court order authorizes this person to come in, they make reasonable accommodations. He added that when this doesn't work, they observe the testing in a private laboratory.

Private and Public Defenders - **Mr. Gamette** stated they see huge differences in the DUI arena. They see a lot more requests for discovery requests in the DUI world, - in the blood alcohol, toxicology world, than they see for any other discipline. He stated that he sees the hands of public defenders tied all the time because of finances; specifically, in the areas of testing and in the areas the lab doesn't perform, like trace analysis (\$20,000 for a single case). He opined that both the public prosecutors and public defenders are reticent to request additional analysis that the state lab does not provide. He stated that the lab provides its services at no cost to any submitting agency. The lab does ask for restitution on some of those cases and that comes through the court system and that becomes part of their budget, but there is no up front cost. He emphasized the expense involved with expert witnesses in specialty disciplines, as well as the expense involved with the retesting of evidence in accredited labs. He also reviewed the critical role time plays, especially for public defenders. He observed they don't have time to come in and speak with lab experts. And, though most documentation is now available at the website, public defenders are now burdened with too much documentation.

Landscape of Forensics in the Country - **Mr. Gamette** discussed the Leahy-Cornyn bill, where the Office of Forensics Science is placed underneath the Department of Justice, which is under the Attorney General to give forensic science a voice, to give it funding and research. He stated that this would be helpful and they are in support of the bill. He reviewed two groups have founded out of federal agencies: the National Commission of Forensic Science; and the Organization of Scientific Area Committees (**Mr. Gamette** serves on this committee). Issues the groups are addressing include: bias, blind testing, standard report language, standard protocols, validation, code of practice, and ethics. He stated there will be changes in the next three or four years in forensics that will be huge.

Bias - **Mr. Gamette** stated that both groups are addressing bias in forensic science. He stated that the key issue is, "how much information do you release to the scientist and at what point do you release it?" He continued, highlighting some of the human factor issues involved.

Summary - **Mr. Gamette** concluded, stating that labs and public prosecutors and defense attorneys need more resources if they are going to improve their current processing situation. He continued, emphasizing that labs should be accredited and have certified scientists, standards, standardized operating protocols, and a continual improvement process, because all of these things give better results for the criminal justice system.

Senator Guthrie asked what can be done to have it so the lab does everything in-house, including work for the defense. **Mr. Gamette** stated the lab does not make that decision, but the lab does accept those samples and would be willing to test any sample coming in from a public defender for retesting or for initial testing. He stated that it is not up to him to decide whether they get to use the lab or not, that it would be more of a legislative decision. He emphasized the lab makes every effort to be unbiased. For example, with a DUI sample, if they have another lab that performs the same type of analysis, they would try to send it to a lab where it has not been analyzed in or by a scientist that it has not been analyzed by. **Representative Meline** asked **Mr. Gamette** if the TV show that covered the Nora Jones case in Pocatello used his lab's tests or if the lab made other tests on the evidence stored on the case. **Mr. Gammett** stated that the evidence the TV people questioned him and his staff about what had already been worked. There was some discussion during the TV show about evidence that had not been worked, and at that point the agency submitted additional evidence they wanted him and his staff to look at. The lab did that analysis not while the TV show was present in the lab, but after the fact. It was a good example of how the lab needed to be unbiased, because the agency was very interested in getting that worked quickly. He made precautions with the scientists to make sure and do the right analysis without pressure.

Representative Luker asked **Mr. Gamette** if he is considered a state's expert witness when he is named by the prosecution in a case. The question was prompted by a statement **Mr. Gamette** made about public defenders being able to call up and ask him about a case. **Representative Luker**

normally an expert belongs to the side that retains them and they are the gatekeeper for who gets to talk and when, other than outside of a deposition. **Mr. Gamette** responded that if a public defender calls the lab to ask about a report, generally the procedure is to call the prosecutor and explain the request for information and ask if the prosecutor wishes to be present as they discuss this with the defense. But, if the defense calls asking general questions regarding the forensic science of the testing, those are questions the lab would answer, and then they would follow up to let the prosecutor know the discussion happened. He added that generally the lab is under subpoena from the prosecution. In some instances, the prosecution elects not to subpoena the lab, and then the defense will. He stated the lab has two different types of testimony; they do more of the forensics testimony on cases with work in the lab, and those are fairly straightforward, but then they also have experts. He explained that the people who calibrate the breath testing instruments do not do the tests; they calibrate the instrument, they are the experts that writes the protocols for the program, and they write the IDAPA rules. These experts will be called to testify, and they are often subpoenaed by private defense attorneys.

Co-chair Senator Lakey when the lab is given a sample and the analysis on that sample is complete, what **Mr. Gamette's** thoughts are on allowing the defense to access the analysis online at the same time as the prosecutor. **Mr. Gamette** responded that the issue is in accreditation. The lab can only officially release the results to the requesting party. He added that the way the lab has operates now, the prosecutor can download it immediately and they can also provide it in PDF format via email immediately. He noted there are a few things they don't make available immediately and the defense would have to submit discovery requests for them.

Representative Luker asked how he separates just doing the lab test from providing expert opinion. **Mr. Gamette** stated that his question is at the forefront of where forensics is right now. It is being looked at by these national panels. At present, he stated that the lab's accreditation drives this whole thing. **Representative Luker** clarified his question, "at what point do you view yourself as a data witness, as opposed to an expert witness?" **Mr. Gamette** stated tries to distinguish, for the court and all the parties involved, what this is more of an opinion. For example, in a DNA report the lab may say that "the samples all match those points," but then the opinion comes in as "at the exclusion of all others" or "this is the individual." He observed that at this point it gets more into the opinion based on statistics. He added their lab scientists their lab scientists are qualified almost immediately as experts. Following up, **Representative Luker** asked how their accreditation would be affected, if there was a legal requirement on the lab to disclose to both parties at the same time. **Mr. Gamette** answered that the lab has had that exact instance where they had to fight their accreditation body on certain things that are state law in Idaho. He observed that generally it works out pretty amicably, that they relent, stating, "if that's what your state requires then that's what you have to go with." Continuing, he observed that it has come up as an issue with the breath alcohol program.

Representative Perry asked **Mr. Gamette** to show her where she can review the actual verbiage regarding the requirements of accreditation on the lab's website. **Mr. Gamette** stated that their accreditation body is ASCLD/LAB and at their website address: www.ascl-d-lab.org, they have all the accreditation documents. He added that at the ISPFs website, if you go under analytical methods, in the file folder "quality control" there is a document "17025 Manual" that addresses each criteria the accrediting body requires.

LUNCH BREAK

Co-chair Representative Bolz reconvened the meeting at 1:30 p.m. and asked **Representative Luker** to begin the discussion on his draft legislation on city public defense. The draft legislation can be accessed at http://www.legislature.idaho.gov/sessioninfo/2014/interim/pdef0925_rcb012.pdf. **Representative Luker** stated that this draft legislation was a discussion piece on how much cities do or should contribute to public defense. The draft is based on an Alaska statute and places the obligation on the city for city ordinance misdemeanors. **Representative Luker** stated that he does

not want to disincentivize cities from enforcing state or county ordinances, but enforcement of city ordinances would be done in a new way and place the responsibility on them. The cities could use private contracts or use existing public defenders or establish their own office. If an offender shows up at the first hearing and there is no public defender present, then the case is dismissed without prejudice, meaning that the city can refile.

Senator Buckner-Webb asked how many of municipal code violations are prosecuted in Idaho. **Representative Luker** replied that LSO is working with the Supreme Court to acquire these numbers. **Senator Buckner-Webb** followed up by asking how many municipal code violations are charged as misdemeanors. **Representative Luker** responded that these statistics will be part of the numbers provided by the Supreme Court. **Senator Buckner-Webb** asked what is the expense of public defense for city code misdemeanors, and **Representative Luker** replied that this also will be part of the information that is being acquired. He stated that the expense is necessary to determine the impact and the burden on cities and whether the legislation could possibly be extended to city prosecution of county or state misdemeanors. However, this draft legislation is just a first step in the discussion.

Co-chair Senator Lakey stated that in Middleton in the past year there were only three misdemeanor prosecutions of city code violations out of several hundred. **Co-chair Senator Lakey** then stated that the term "first appearance" on page 2 of the draft could be clarified to possibly "first appearance after qualification" to account for when a defendant becomes eligible for a public defender.

Senator Guthrie asked about city residents who have to pay county taxes that go towards public defense and how city residents would then have to pay again for city public defense. **Representative Luker** replied that county taxes do not go to paying a city prosecutor, so there is a parity issue and asked, "why shouldn't cities also pay for a city public defense?" **Senator Guthrie** followed up by stating that he was not advocating for either side, but is merely asking about issues that are likely to come up. He then stated that prosecution is elective, but public defense is mandatory; therefore, city residents are already paying county taxes for a required function. **Representative Luker** responded that this is similar to the position that the state should take over funding for public defense but then theoretically there would be a disconnect between expenditures in a prosecutor's office and how much the state has to pay. Counties would fund prosecution and the state would have to catch up to the prosecution's funding. It's the same principle when there is a prosecutor's office at the city level and the county has to catch up.

Representative Trujillo asked how it would work in a city like Idaho Falls that chooses to contract for a city prosecutor rather than use the county prosecutor. She observed there seems to be an issue where cities choose to pay to contract for prosecution and also cities seem to have some leeway in getting contracting with a city prosecutor, unlike a county prosecutor who is elected. **Representative Luker** stated that if a city chose not to fund a city prosecutor, then it could rely on a county prosecutor to enforce county and state laws. But when city ordinances are enforced, that is above and beyond.

Senator Mortimer agreed with **Representative Luker's** previous statement and stated that his initial opinion of this draft is positive. Cities should be responsible for their ordinances that go above and beyond a county's.

Co-chair Senator Lakey stated that cities are required under Title 50, Idaho Code, to appoint a city attorney and under Section 50-208A, Idaho Code, city attorneys are required to prosecute violations of county or city ordinances committed within the municipal limits. Cities can either hire their own city attorney or contract with the county, but they are required to prosecute such violations. **Representative Luker** replied that although cities are required to prosecute violations of city ordinances, the city ordinances themselves are discretionary with the city.

Co-chair Representative Bolz then called on **Seth Grigg** of the AIC for his opinion on the draft legislation. **Mr. Grigg** stated his appreciation that the legislation is narrowly tailored. He stated that cities may still have some concerns and that once the data is received, the total number of

city ordinance misdemeanors will be a very small percentage and won't account for much revenue. Also, some cities may be discouraged from enforcing city ordinances, thus creating a public safety issue. The AIC will continue to work closely with cities to reclassify misdemeanors as infractions, when appropriate.

Co-chair Senator Lakey stated that he understands the concern of city residents potentially paying twice for city and county public defense, but he is open to this legislation. Cities determine what is a misdemeanor versus an infraction. Some valid points are raised by this legislation, and he is willing to listen.

Senator Guthrie commented that county law enforcement is often the main law enforcement in a county, so they often have jurisdiction, especially in small cities. County law enforcement sometimes needs to contract for additional help to support cities with enforcement issues during peak times. Much like with public defense, the county has the obligation, and this could open a can of worms.

Co-chair Senator Lakey addressed the current issue in Middleton. County sheriff's departments are responsible for law enforcement countywide. If a city wants enhanced law enforcement in the city, it can contract for this. Middleton has been contracting with the county sheriff for additional officers in town but now wants to have more control. Middleton has not renewed its contract with the county sheriff. It is now forming its own police department and contracting with the city of Nampa until its new police department is ready. **Co-chair Senator Lakey** stated that if this legislation is passed, cities will still only need to contract with county law enforcement for enhanced law enforcement.

Co-chair Representative Bolz stated that this legislation was only up for discussion and that any decision on it will not be made until October or November.

Representative Perry commented that this legislation, regardless of costs, changes the culture that is weighed heavily towards the prosecution. And, she suggested this legislation could begin to balance both sides of the equation.

Co-chair Representative Bolz stated that reclassification of misdemeanors to infractions could also be a big factor and greatly change the numbers on city ordinance misdemeanors.

Co-chair Representative Bolz then asked the committee members if they had any input for the Public Defense Commission. **Senator Mortimer** stated that he would like to know from the commission how quickly funds allocated for training can be put to use. **Co-chair Representative Bolz** responded that the commission has looked at this issue and is determining how to deal with it; they are looking at the most efficient way to spend the training dollars, whether it be through grants to the counties or a centralized training session.

Representative Luker remarked on **Mr. Linville's** earlier comments on keeping local control of public defense. This leads into the resolution passed by the IAC that was in favor of state control. It sounds like the committee is on the right track with its focus on training, qualifications and necessary contract provisions.

Co-chair Representative Bolz called on **Dan Chadwick**, who stated his belief that counties are not responsible for the public defense system. The state is responsible for public defense, and the state has delegated this constitutional obligation to the counties. **Mr. Chadwick** then stated that parity between prosecution and public defense is not the real issue, it is a red herring according to David Carroll. Parity is not required, only a public defense system that is constitutional. You can have a system with parity that is still unconstitutional. **Mr. Chadwick** stated his admiration for **Mr. Linville** and went on to say that in Gem County there are some problems with public defense and some areas that need work. He suggested the committee will need to focus on these problem areas, if they ever need to defend the public defense system. The IAC adopted a resolution in February with the idea that counties have a lot of responsibility for public defense, but none of the authority. **Mr. Chadwick** stated that local control does not exist in the way that the committee may believe that it does. Many counties are having success with their public defense, but this is not happening

statewide. The position of the counties was not unanimous, but the position of the counties as an association is that they stand by their February resolution. The counties will put on the table the revenue that they collect, approximately \$23 million as of September. The counties prefer to put this money on the table and that the state be responsible for public defense in Idaho. The counties' role will simply be to provide funding.

Co-chair Representative Bolz asked about the funding that the counties are willing to provide to the state and what he meant by putting this money "on the table." **Mr. Chadwick** replied that this \$23 million is what every county is putting into the system right now. He has heard that this may change to a per capita basis. **Co-chair Representative Bolz** asked if this money would theoretically go to the state and then be redistributed to the counties or if the counties would keep this money to use on standards, training, etc. **Mr. Chadwick** stated that it could work either way, but the resolution states that the money go to the state and the state runs the system. **Co-chair Representative Bolz** stated that some counties would not like this plan. **Mr. Chadwick** agreed, but stated that many commissioners would love to see the burden taken off the counties.

Senator Guthrie asked if under the IAC's plan public defenders would be state employees and no longer work for the county commissioners. **Mr. Chadwick** replied that this may be true but they may also be regional employees, depending on how the Legislature creates a state system. **Senator Guthrie** asked if the counties' motive is to freeze the dollars that they would supply at their current level, thus putting any additional burden on the state. **Mr. Chadwick** responded that this is correct. Many counties are at their statutory caps and have no way to raise additional revenue for enhancements. There is no flexibility in many counties. With a state-run system, the state can manage the system with a good base of revenue to provide a constitutional system. Following up, **Senator Guthrie** asked what would happen with a county like Ada that has large population growth and "wouldn't they have an unfair advantage by paying less than their fair share?" **Mr. Chadwick** said that this perhaps may be true, but the counties would no longer have to deal with this issue. It would then be squarely a state issue and in the hands of the Legislature, as far as appropriation, and in the hands of the Public Defense Commission that will provide standards and oversight.

Representative Luker asked if the IAC had passed a new resolution on this issue. **Mr. Chadwick** replied that a new resolution was discussed, but not adopted, at their last meeting. So, the counties still go by the February resolution. **Representative Luker** asked if the state assumes the burden of public defense, would the counties be willing to give up autonomy over their prosecution's budget. **Mr. Chadwick** responded that it is difficult to say, but probably not. The Idaho Constitution states that prosecution is a county function.

Representative Trujillo asked if counties are afraid of an unfunded mandate and if this is part of the counties' motivation for a state-run system. **Mr. Chadwick** stated that this is a big issue for the counties. Other issues are at play too such as standards for contracts, conflict counsel and the lack of attorneys in small counties. Also, two questions to address are: "can they provide a constitutional system and do they have the resources?" But, he observed, the fear of an unfunded mandate is always there and counties are seeing problems as they engage in new contracts that start on October 1.

Representative Meline asked about county levy amounts and if they are just for public defenders. **Mr. Chadwick** stated that this is the whole levy authority. Other interests are competing for the same dollars. **Representative Meline** then stated her concern about many public defenders in the state coming to the end of their careers. This may result in a higher cost of training and manpower to do the jobs of seasoned public defenders. **Mr. Chadwick** agreed with this statement.

Representative Trujillo asked, "if nineteen counties are capped out on their levies, why not cap the others?" **Mr. Chadwick** replied that the levies cannot be capped because other county functions are included in these levies.

Co-chair Senator Lakey mentioned that the issue of local control keeps coming up in this committee and amongst the counties. He believes that minimum standards are beyond the control of the counties, but once minimum standards are established, local control does exist in addressing who the counties hire, whether it is in-house or contract, and in relationships with county commissioners. He observed that local control does not exist goes too far. **Mr. Chadwick** agreed with **Co-chair Senator Lakey** and responded that much depends on the system that the state wants. How will they meet their constitutional requirement for public defense? The delivery mechanism then becomes one of judgment, but the counties must have the resources to provide local control.

Senator Guthrie commented that the system proposed by **Mr. Chadwick** provides no Justice Fund cap relief. Counties still have to tax and collect. He asked "why would counties tax, collect, remit and give up control?" **Senator Guthrie** also commented on **Mr. Chadwick's** point that the constitutional duty falls on the state. The Idaho Constitution requires free public schools, and local school districts will do supplemental levies and will pay teachers more than the state salary schedule. It is not so simple to suggest that counties can wash their hands of providing public defense. **Mr. Chadwick** clarified that there is a constitutional provision at the state level for public defense. He is referring to the Sixth Amendment to the U.S. Constitution and the Supreme Court's decision in *Gideon v. Wainwright*, which focuses on the state's responsibility to enforce the Sixth Amendment. Nothing is said in *Gideon* about the counties. Chapter 8, Title 19, Idaho Code, does provide for the state public defense system and delegates this to the counties. The state can change this system at any time, at the Legislature's discretion. As for the counties giving up money for public defense to the state, he stated counties would then know what the costs would be and relieve the burden on the counties when they have problems meeting the standard for public defense. Montana went from a county system to a state/regional system. He observed this has been both good and bad. Their system has become more costly, and he expects Idaho's system to become more costly too, because of standards, contract requirements, etc.

Representative Luker agreed that parity is not the biggest issue in public defense, but asked "what would happen if a city like Boise added ten new people to the prosecutorial staff and how would the state's public defense system catch up?" **Mr. Chadwick** replied that the state would have to keep a constant eye on what is happening in both prosecution and public defense and allocating costs accordingly. The state can manage growth, which will require coordination, cooperation and good working relationships.

Co-chair Representative Bolz then asked the committee members for their input on what to do at upcoming meetings.

Representative Trujillo stated that she would like to hear further comment from the counties on how changes that have already been implemented are affecting them and ways to improve on those. **Mr. Chadwick** replied that much of the information gathered by **Mr. Hoskins** will help answer these questions. Budgets and contracts for the next year will also help provide answers in terms of real dollars. **Co-chair Representative Bolz** stated that it is difficult to make decisions without all of the facts and they have not had enough facts up to this point.

Co-chair Senator Lakey stated that the committee needs to start discussing costs and what system will be implemented. He stated that he still favors local control rather than a state agency. They also need to look at standards for public defenders and a probable increase in costs that these may cause and answer the question, "how will additional costs be covered?" **Co-chair Representative Bolz** stated that the Public Defense Commission will be meeting and he hopes to have more answers for the committee at the next meeting.

Representative Luker stated that what is left to decide is if they want to change the delivery system for public defense and if the cities will be involved or not. Everything else seems to be flowing through the Commission and the answers they provide. It will then be up to the Legislature as a whole to deal with the Commission's recommendations.

Representative Trujillo stated that she favors local control or even a regional system. She would like to focus on these, rather than a state-based system. She would also like to have further discussion on the role of the cities in public defense, in line with the draft legislation presented by **Representative Luker**. **Co-chair Representative Bolz** responded that **Mr. Grigg**, **Mr. Chadwick**, and **Mr. Hoskins** will have more data at future meetings to help in this regard.

Representative Meline stated that she is also in favor of local control and that she would like to see the money allocated for training start to be put to use. **Representative Trujillo** agreed with this comment and stated that if the Legislature chooses a regional system, then the training should also be regional, with perhaps a regional training center. **Co-chair Representative Bolz** stated that Sara Thomas, of State Appellate Public Defender's Office, has said that training in groups is more effective and efficient and an area that the training should focus on is the criminal aspect.

Senator Buckner-Webb stated that she hopes that the committee receives more information soon so that it can begin making decisions.

Senator Guthrie stated that they first need to identify what the funding model will look like on the front end. This will impact how contracts are done, the influence that local jurisdictions will have and possibly the training. **Mr. Hoskins** stated that it all depends on the data collected, and he hopes that everyone will contribute with data. As for front end funding, he asked, "would this come from the General Fund or some new dedicated fund that is created?"

Senator Mortimer stated that he too is in favor of local control and agrees that there would likely be an increase in costs. If multiple counties want to come together on a regional basis, that is their choice. As for a funding model, he believes that there does need to be a sharing on a local basis and state basis. He would like to see the counties come back to the committee and discuss a sharing model that is acceptable to the state, the counties, and possibly the cities.

Representative Luker stated that he wants to explore why some counties are up against their levy caps and if there is some narrowly tailored relief that could be provided, since costs are likely to go up. **Co-chair Representative Bolz** asked **Mr. Chadwick** if he would be willing to discuss this issue at a future meeting, and **Mr. Chadwick** said that he would.

Representative Meline stated that she would like to know which counties and regions are hurting and need to hire public defenders. **Co-chair Representative Bolz** remarked that this issue came up in a meeting of the Public Defense Commission and if the commission was "the enforcer" on this issue. This question still needs to be resolved. **Representative Luker** agreed with **Representative Meline's** point and stated that they need to know where problems exist. Perhaps the commission could be more of an evaluator rather than an enforcer.

Representative Trujillo remarked that identifying which areas are having problems depends on who you ask. The courts may have a different perspective than the ACLU.

Following up on **Representative Meline's** comment, **Co-chair Senator Lakey** stated that the ABA recommendations talk of an independent body with some ability of control. Perhaps if there is a dispute between the county and the public defender, then the Public Defense Commission could act as some sort of body for dispute resolution, if it cannot be resolved at a local level.

Senator Guthrie wondered if it would be possible to have a system of state involvement in regards to money, if the money from the counties could be adjusted for inflation or the census over time. If there is such a funding model, there could still be local control.

Co-chair Representative Bolz adjourned the meeting at 2:40 p.m.